IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

FLOYD G. AFFOLDER,
Petitioner,
vs.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.
No. 200.

RESPONDENT'S SUGGESTIONS AND BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

LON HOCKER, JR.,
407 North Eighth Street,
St. Louis (1), Missouri,
Attorney for Respondent.

JONES, HOCKER, GLADNEY & GRAND,
ORVILLE RICHARDSON,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

Miscellaneous.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

FLOYD G. AFFOLDER,
Petitioner,
vs.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.
No. 200.

SUGGESTIONS IN OPPOSITION TO ISSUANCE OF THE WRIT.

OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals has now been published and may be found at 174 F. 2d 486.

CORRECTED STATEMENT OF THE CASE.

Petitioner has omitted from his statement all of the respondent's evidence, so that a reading of his petition and brief leaves the impression that the Railroad had no defense. We offer this additional statement in correction of the inaccuracies and omissions thus appearing. Supreme

Court Rule 27. Throughout this brief we will refer to the parties as designated in the trial court.

The defendant filed an answer denying that it had violated the Safety Appliance Act (R. 5). Its theory of the case was simply this: (1) It conceded that two cars had failed to couple automatically by impact; (2) it offered evidence that these cars were "equipped with couplers coupling automatically by impact" if properly used by its employees (R. 104, 111, 113, 114, 115-117); (3) it contended that the coupling probably failed because Tielker, a switchman, failed properly to prepare one of the couplers for automatic operation before the impact.

It was conceded by all of the witnesses that an automatic coupling by impact cannot be made unless one or both of the couplers is open at the time of a fair trial. In order that couplers may be opened and thus prepared for automatic operation they are equipped with levers extending out to the sides of the cars where they may be worked without the necessity of men going between the cars. When the lever is lifted the coupler lock is lifted ("pin is pulled") and the knuckle of the coupler opened ready for an automatic coupling by impact.

In the switching operation involved in this case a Rock Island car was first kicked against and coupled to a string of cars. Plaintiff's witness, Tielker, conceded that when this was done the coupler on the unattached or following end of the Rock Island car could have been closed by the momentum of the impact (R. 47). If that happened, then it was absolutely necessary for a switchman to open the coupler on the leading end of the next car (a Pennsylvania hopper) to be set against the Rock Island car before they could couple automatically by impact.

It was the duty of plaintiff's switchman witness, Tielker, to open that coupler on the Pennsylvania hopper car before attempting an automatic coupling. He was called as a witness by the plaintiff, not by the defendant, and although he testified that he "pulled the pin" and thus opened the Pennsylvania car coupler, his credibility was directly attacked in an extended cross-examination (R. 47-60) and in defendant's oral argument to the jury (R. 147-149).

Moreover, in addition to its evidence that the couplers were in good condition at the time of the accident, the defendant proved that shortly thereafter the coupler on the Pennsylvania car was found to be locked, i. e., the knuckle was closed, the pin was down, and in that position it could not couple automatically with another closed coupler (R. 104). Had it failed to couple automatically on impact it would have been open, not closed, following the impact.

The Court of Appeals held that the trial judge had erred in instructing the jury as follows (R. 163):

> "The plaintiff, in order to discharge the burden of proving a breach of defendant's duty, is not required to prove the existence of any defect in such coupler, **but need only prove that any such coupler did in fact fail to couple automatically by impact.**"

It also overruled defendant's contention that the separation of the cars was not the proximate cause of plaintiff's injuries. It thus held that plaintiff had made a case for the jury and remanded the cause for a new trial.

JURISDICTION OF THIS COURT.

Although we do not question this Court's jurisdiction to issue a writ of certiorari under 28 U. S. C. A., Section 1254, it is clear that the writ is one of grace and discretion, not one of right, and that no ground exists for review of

the unanimous decision of the Court of Appeals in this case. The opinion of that Court discloses no special or important reason for the writ, no conflict with decisions of other circuits or of this Court and nothing of a novel nature requiring review by the Supreme Court. Supreme Court Rule 38.

The opinion of the Court of Appeals discloses that the parties were in complete agreement on the fundamental law governing the trial of this action. As that Court pointed out, the question presented was "not one of law, but of construction of the court's instructions" to the jury. 174 F. 2d, l. c. 488.

The entire substance of the petitioner's position here is disagreement with the Court of Appeals' construction of the trial court's charge. Whether a portion of that charge was confusing, misleading and in conflict with other portions of the charge is a matter upon which Judge Hulen in the trial court had one view and Judges Collet, Sanborn and Reddick held contrary views. In no respect did the Court of Appeals misconstrue the Federal Employers' Liability Act, or the Safety Appliance Act or refuse to follow decisions of this Court. We do not understand that certiorari will be granted to review a decision of the Court of Appeals applying concededly correct rules of law in determining whether a portion of a jury charge is confusing, misleading or conflicting with the balance of the charge. The office of the writ is not to furnish the defeated party with a second hearing, or to interfere where conclusions of the Courts of Appeal depend on an appreciation of circumstances which admit of different interpretations. Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922; Federal Trade Commission v. American Tobacco Co., 274 U. S. 543, 47 S. Ct. 667, 71 L. Ed. 1193.

This is not a case in which either a lower or an appellate court has narrowly construed the Federal Employers' Liability Act or the Safety Appliance Act to set aside a jury's findings in favor of the employee on issues of fact. On the contrary, the Court of Appeals overruled defendant's contentions that the alleged violation of the Act was not the proximate cause of plaintiff's injury and held that that issue was one for the jury to decide. Furthermore, in construing the trial court's instructions to the jury the Court of Appeals found that the error there inhering arose from the trial court's attempt to invade the province of the jury and to draw inferences as a matter of law. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 403.

REASONS RELIED ON FOR DISALLOWANCE OF THE WRIT.

I.

Petitioner has not shown any reason for invoking this Court's discretionary power to issue a writ of certiorari. The Court of Appeals did not ignore, but rather followed, decisions of this Court and other circuits. The only issue decided adversely to plaintiff by the Court of Appeals, as the Court itself declared, was "not one of law, but of construction of the court's instructions". Whether or not the Court of Appeals paid "lip service" to a correct rule of law while failing to apply it to a jury charge admitting of different constructions does not present any question for review by certiorari. Supreme Court Rule 38; Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922; Federal Trade Commission v. American Tobacco Co., 274 U. S. 543, 47 S. Ct. 667, 71 L. Ed. 1193.

II.

Plaintiff charged a violation of the automatic coupler provision of the Safety Appliance Act (45 U. S. C. A., Section 2). Defendant denied this charge (R. 5), and further contended that plaintiff's injury was, in any event, not proximately caused by a failure to couple. After a verdict for plaintiff defendant appealed to the Court of Appeals for the Eighth Circuit, which liberally construed the Safety Appliance Act and held (1) that plaintiff made a submissible case for the jury, but (2) that the trial judge had erroneously instructed the jury by requiring the jury as a matter of law to infer that the coupler was defective merely because the coupling operation had failed, thus invading the jury's province to draw its own conclusions from circumstantial evidence and ignoring the defendant's theory of the case that the coupler was in good condition, but had been improperly used.

Plaintiff's petition for a writ of certiorari presents no question concerning the issue ruled in his favor. *For the purposes of his petition, we will concede that he made a case for the jury on a violation of the Act.* Compare situations involved in Meyers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615; Penn. v. Chicago and North Western Ry. Co., 335 U. S. 849, 69 S. Ct. 79, 93 L. Ed. 37; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 403. Plaintiff's chief contention is contrary to the spirit of the cases last cited, since it is his present position that the inferences to be drawn from the admitted failure to couple were properly arrived at as a matter of law by the trial judge in his charge to the jury.

III.

Before the lower court and the Court of Appeals the plaintiff conceded that the jury was not compelled to find

that the couplers were defective merely because the cars had failed to couple by impact. The Court of Appeals correctly stated the facts—and law—when it said (174 F. 2d, l. c. 488):

> "The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with 'couplers coupling automatically.' That is the law. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; Southern R. Co. v. Stewart, 8 Cir., 119 F. 2d 85; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995. The trial court so understood it. And there was no dispute concerning the fact that these cars did not couple automatically."

In the Court of Appeals plaintiff took the position that the trial judge had merely permitted, rather than required, the jury to find the ultimate fact (defective equipment) from the admitted failure to couple.

Now, however, in this Court on petition for writ of certiorari he veers to a new stand and claims that the mere failure to couple does entitle a trial judge to tell the jury as a matter of law that the Act has been violated. He has alternative contentions, but that is his chief point.

Although petitioner is clearly wrong in his view of the law announced above by the Court of Appeals and fully supported by the Supreme Court decisions cited, he is in no position to ask this Court to quash an opinion of the Court of Appeals on a point never presented to that Court because there conceded by petitioner. Owens v. Union Pac. R. Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683;

Sonzinsky v. U. S., 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772.

IV.

Alternatively, petitioner contends that the trial court's charge to the jury did not compel it to find that the Act had been violated merely because the coupling had failed. The Court of Appeals construed the charge otherwise and held that the correct portions of the instructions did not "cure" the incorrect part. This question, as the Court of Appeals held, is "not one of law, but of construction of the court's instructions."

The statute (45 U. S. C. A., Section 2) made it unlawful for defendant to handle any car "not equipped with couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars." It is conceded that the defendant's duty is an absolute, unqualified and continuing duty. It is conceded that the plaintiff need not prove by direct evidence the existence of any particular defect in the coupler which would render it inoperative. It is conceded that he is entitled to go to the jury upon circumstantial evidence or the inference arising from the failure of a coupler to work after it had been properly prepared and a fair trial made. However, the inferences to be drawn from the failure to couple after proper preparation and a fair trial may not be declared as a matter of law as requiring the jury to find that the equipment is defective and that the statute has been violated merely because plaintiff has introduced evidence from which that inference may be drawn. The jury may draw the inference and may find that the Act has been violated, but it is not required to do so.

Therefore, the Court of Appeals properly held that the trial judge should have explained the effect of this circumstantial evidence to the jury and should not have in-

vaded the jury's province by drawing the inference for it that the Act had been violated merely because "such coupler did in fact fail to couple automatically by impact." In so ruling the Court of Appeals followed and did not ignore controlling decisions of this Court. Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1344, 91 L. Ed. 1615; Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995; C. R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; Southern Ry. Co. v. Stewart, C. C. A. 8, 119 F. 2d 85; Vigor v. C. & O. R. Co., C. C. A. 7, 101 F. 2d 865; C. M. St. P. & P. R. Co. v. Linehan, C. C. A. 8, 66 F. 2d 373. See, also, Sweeney v. Erving, 228 U. S. 233.

There could be no clearer case demonstrating the reason for the rule of permissive as distinguished from compulsive inferences than the fact situation existing in the case at bar. It was conceded by plaintiff that two locked or closed couplers will not couple automatically by impact. It was conceded by plaintiff that it was Tielker's duty to pull the pin and open the knuckles on the Pennsylvania hopper car before it was kicked against the Rock Island car. If Tielker did pull the pin there was a fair trial, and then the jury could infer that the coupling failed because of defective equipment. It is to be noted that the ultimate issue of fact is whether the cars were properly equipped with automatic couplers in good condition. One method of proving liability is circumstantial, i. e., by showing a failure to couple after proper preparation and a fair trial. Even so, the plaintiff's burden is to prove a violation of the Act, which the jury may or may not infer, as it chooses, from the circumstantial evidence submitted.

If Tielker did not pull the pin, then the coupling failed, not through defective equipment, but solely because the coupler had not been properly used and prepared by Tiel-

ker. This was a complete defense, if believed by the jury. Chic., M., St. P. & P. R. Co. v. Linehan, C. C. A. 8, 66 F. 2d 373, and cases cited.

However, the trial judge, instead of requiring the jury to find that the coupler was properly prepared for coupling before it could infer that the equipment was defective, ignored that defense in this portion of the charge. He told the jury that the plaintiff "need only prove that any such coupler did in fact fail to couple automatically by impact." This not only removed the question of improper use from the jury's construction, but in effect directed a verdict for plaintiff upon the conceded fact that the coupling had failed. The Court of Appeals so construed the trial court's charge, and correctly held that the charge as a whole was thus rendered confusing, misleading and conflicting.

Correctly worded, the charge would have been:

> "If you find that Tielker pulled the pin on the Pennsylvania car before its impact with the Rock Island car, then you may infer, if you so choose, that the cars failed to couple because not equipped with couplers coupling automatically by impact."

Such an instruction would have left the issues of fact to the jury to determine and would not have ruled them as a matter of law. Where issues of fact exist they can no more be resolved by a court against a railroad than in its favor. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 403, and cases cited.

V.

Throughout his petition, brief and argument petitioner treats Tielker's testimony that he opened the Pennsylvania car coupler as conclusively establishing that to be the fact.

To that unwarranted assumption there are several obvious answers. First, neither the defendant nor the jury were required as a matter of law to believe plaintiff's witness Tielker. Second, his credibility on this issue was directly attacked and open for decision. Third, defendant offered evidence that the couplers were in good condition, that both were found closed after the accident, and that under those circumstances the only way in which the cars could have failed to couple was through improper handling, i. e., the failure of Tielker to open the knuckle on the Pennsylvania car coupler before it was sent down against the Rock Island car.

In other words, defendant's defense was simply this—it it had not violated the Act; it had not handled cars *not equipped* with couplers automatically coupling by impact. The instruction in effect compelled the jury to accept Tielker's testimony as true. And since it was undisputed that the cars did fail to couple automatically by impact *(the only proof required of plaintiff in the court's charge)* the trial court thereby directed a verdict for plaintiff as a matter of law and deprived defendant of its defense under the Act.

VI.

Plaintiff's final contention and the burden of his argument to the Court of Appeals is that the error in the trial court's charge was "cured" by other correct portions of the court's instructions. The Court carefully considered the charges as a whole and at some length demonstrated and concluded that the charge was confusing, misleading and conflicting. The correct portions of the charge conflicted with the incorrect part thereof, and under those circumstances no jury could tell which direction of the court to follow, and no court on appeal could tell which direc-

tion was followed. Conflict in the charge was not cured and that conclusion by the Court of Appeals is itself prima facie proof of the error and confusion in the court's instructions to the jury. However much difference of opinion might exist upon that construction adopted by the Court of Appeals, the office of the writ of certiorari is not to review such findings. Supreme Court Rule 38; Magnum Import Co. *v.* Coty, supra; Federal Trade Commission v. American Tobacco Co., supra.

CONCLUSION.

Respondent respectfully submits that the writ of certiorari prayed for by petitioner should be denied.

LON HOCKER, JR.,
Attorney for Respondent.

JONES, HOCKER, GLADNEY & GRAND,
ORVILLE RICHARDSON,
Of Counsel.

BRIEF IN OPPOSITION TO THE PETITION.

The foregoing statement contains a reference to the jurisdiction of the court, corrections to petitioner's statement and reasons for disallowance of the petition for a writ.

ARGUMENT.

I.

Petitioner's first point in his brief is that the charge taken as a whole was correct even though one part of it was wrong. Although it is recognized that one part of an ambiguous charge may be "cured" by another, clarifying, part of the charge, that rule does not apply where error, as distinguished from mere ambiguity exists. "The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and secondly, it is impossible after verdict to ascertain which instruction the jury followed". Standard Life & Accident Ins. Co. v. Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337.

The Court of Appeals explicitly recognized the rule that a charge should be read as a whole, but this can be done only if the charge actually is a whole, and if it is a paradox, it is error.

II.

The second complaint which petitioner voices is of the holding of the Court of Appeals that the trial judge should have explained the legal effect of proof of the failure to couple.

To bolster this claim petitioner again calls attention to Tielker's testimony that he prepared or opened the Pennsylvania car coupler before an automatic coupling with

the Rock Island car was attempted (see his brief, pp. 35, 37). He implies to this Court that since this testimony was not directly contradicted it must be taken as true. It is only by such a device that he is able to invoke the rule that a failure to couple *after proper preparation and a fair trial* is "direct proof" (whatever that means) of defective equipment.

We have adequately demonstrated elsewhere that although Tielker's testimony was not directly contradicted, it was disputed (a) by defendant's evidence that the couplers were approved and in good order, (b) by defendant's evidence that the Pennsylvania coupler was found closed or locked shortly after the accident, and (c) by defendant's challenge to this witness' veracity throughout the trial. The trial judge did not require plaintiff to prove that the coupler had been properly prepared. Instead he told the jury that the only thing required to be proved by plaintiff was the failure to couple. Since this had been admitted, no issue of fact was presented to the jury. This part of the charge was a peremptory direction of the verdict for plaintiff, completely ignoring a defense. Chicago, M, St. P. & P. R. Co. v. Linehan, C. C. A. 8, 66 F. 2d 373, and cases cited.

The Court of Appeals did not dispute the general holding that a violation of the Safety Appliance Act may be submitted in the language of the statute. The trial judge did not so submit the case in that part of the charge found erroneous. Moreover, in some of the cases cited by petitioner the only fact issue before the jury was whether the coupler had failed. In the case at bar, as the Court of Appeals pointed out, there was a conflict and dispute concerning the cause of the separation of the cars. It was a question for the jury to decide and not for the court to rule whether the coupler was defective or whether the cars had separated for some other reason.

III.

The next "assigned error" is the ruling of the Court of Appeals that in a case such as this, depending upon circumstantial evidence, the effect and proper use of the mere failure to couple should have been explained.

It is at this point that petitioner abandons his position before the Court of Appeals where he contended that the instruction as a whole did not compel a verdict, but merely permitted the jury to infer a violation of the Act from the failure to couple. Therefore we will not repeat our own argument set out in the foregoing suggestions in opposition to the petition.

Plaintiff's new contention was not presented to the Court of Appeals and would not entitle him to a writ to quash a ruling never made. However, if the point be considered now for the first time on its merits, then it is he who is urging a novel, unprecedented and thoroughly unsound view of the law. For if his contention were sustained, then previous decisions of this Court would be overruled, the statute rewritten, and the railroad deprived of its defense that the coupling failed, not because of defective equipment, but because improperly prepared or inadequately tried. We are thus called to answer petitioner's argument that in this class of cases (1) improper preparation or lack of a fair trial may be ignored by the court and jury, and (2) the only proof required of plaintiff, the only issue before the jury, is whether the coupling failed.

The statute sued on (45 U. S. C. A., Sec. 2) is as follows:

> "*Automatic Couplers.*
>
> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used

in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The criticized portion of the charge (Abs. 163) is as follows:

"The plaintiff, in order to discharge the burden of proving a breach of defendant's duty, is not required to prove the existence of any defect in such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact."

Defendant strenuously insisted that the cars were properly equipped, and that the failure to couple was because of improper use, rather than improper equipment.

The criterion of the charge was, "did they *in fact* fail to couple?"

The criterion of the statute is, "were they equipped with efficient couplers?"

Now it is true that the courts hold that proof of failure to couple upon a fair trial authorizes a *permissive inference* of equipment with one or more inefficient couplers. But this inference must be drawn *by the jury*. It cannot (as it was here) be crammed down their throats by the court.

In Myers v. Reading Co., 331 U. S. 477, 482, 484 (1946), an alleged safety appliance defect in a brake was involved. While that was a brake and this is a coupler the principle of law is identical. Coupler cases are cited as authority for the propositions, stated as follows:

"A railroad subject to the Safety Appliance Acts may be found liable if the *jury reasonably can infer*

from the evidence merely that the hand brake which caused the injuries—was not an 'efficient' hand brake * * *.

"That testimony was not descriptive of precise mechanical defects in the structure of the brake. It was, however, simple and direct testimony from which a *jury reasonably might infer* the brake's defectiveness and its inefficiency in the sense necessary to establish a violation of the Safety Appliance Acts."

In Vigor v. C. & O., 101 F. (2d) 865, l. c. 865 (C. C. A. 7, 1939), cert. den. 307 U. S. 35, the court held, quoting Roberts, Federal Liabilities of Carriers, as follows:

"'* * * proof that cars became uncoupled while in use * * * is evidence from which a *jury is entitled to infer* that the coupler was not in condition to perform the function required of it by the statute, and hence that the Act was violated * * *.'

"We think this rule is a fair deduction from the decisions. The District Court (sitting as a jury) therefore was warranted under the evidence in inferring that the coupler was not in condition to couple automatically by impact * * *."

Examples of charges which, as these cases require, properly submit this inference to the jury are not hard to find.

In Chicago, M., St. P. & P. R. R. Co. v. Linehan, 66 F. (2d) 373, 378, 379 (C. C. A. 8, 1933), that court said of the charge: "This seems to state the law clearly" (l. c. 379). The charge was:

"'* * * There is testimony that the mechanism to be moved in the coupler by the pin-lifting device weighs some sixty-three pounds. Now then, if Linehan failed to exert reasonable force or pull on this

pin-lifting device, then, of course, failure of the device to operate is of no weight in proving a defective coupler. On the other hand, if he did apply reasonable force and customary force and the knuckle failed to open, necessitating opening the knuckle with his hands, you should give it such weight as it is entitled to in determining the ultimate question that you are called upon to decide, and that is, whether or not the defendant equipped this car in question with couplers which would couple automatically upon impact, and which could be uncoupled without the necessity of men going between the ends of the cars.' "

In Safety Appliance Act cases a failure to couple authorizes the inference of inefficient equipment. In cases ruled by *res ipsa loquitur* the occurrence authorizes the inference of negligence. In either case the inference is for the jury, and not for the court, and in either case it is error to instruct the jury to make the inference.

In Sweeney v. Erving, 228 U. S. 233, 240, this court held:

"In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted, as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

A case in point is the opinion of this Court in Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29 (1944), a case in which the injured party was represented by the same counsel as appear for the plaintiff here, and in which your Honors held (l. c. 35):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 318 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The shoe pinches equally on either foot. If the court may not forbid a jury from making inferences permitted under the law, neither can it require the jury to make inferences permitted under the law. If the plaintiff was deprived of the right of trial by jury in the Tennant case, the defend-

ant was deprived of the right of trial by jury in the Affolder case. Inferences are for the jury, not for the court.

IV.

The fourth "assigned error" is claimed for an asserted ruling of the Court of Appeals on plaintiff's argument to the jury. That Court nowhere in its opinion ruled any such point, so that this "error" may be ignored. The argument was cited as illustrative of the prejudicial nature of this error in the charge. Plaintiff's counsel then construed the charge (in advance of delivery) as *compelling* the inference: precisely as the Court of Appeals construed it in the opinion.

V.

The last contention of plaintiff is that he was deprived of "a right to which he is entitled under the federal law." This "right" he explains to be "the right to the benefit of a judgment rendered below in his favor where the evidence plainly showed a violation by respondent of the Safety Appliance Act proximately causing petitioner's injury, and where the trial below was free from prejudicial error."

The evidence did not "plainly" show a violation of the Act. But even if it did, since the plaintiff had the burden of proof, a verdict for plaintiff could not be directed. The evidence conflicted and its credibility and weight were for the jury. Whether there was prejudicial error in the instructions to the jury is the only question presented.

It *is* plain that the petitioner seeks a reargument of his case, not because any of the grounds for certiorari exist, but solely because he does not agree with the Court of Appeals' construction of the trial judge's charge to the jury. To make something "novel" or "important" he abandons a position taken before the Court of Appeals and adopts an

argument having no support in reason or precedent. *In the last analysis it is not a jury trial that he wishes but a court-directed verdict.* He was not deprived of a jury trial, but rather of a verdict based upon a compulsive syllogism: in effect directed as a matter of law. The cause was remanded for a new trial and not reversed outright.

No ground for certiorari exists and the petition should be denied.

Respectfully submitted,

LON HOCKER, JR.,
Attorney for Respondent.

JONES, HOCKER, GLADNEY & GRAND,
ORVILLE RICHARDSON,
Of Counsel.